

63 FLRA No. 187

UNITED STATES DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Respondent)

and

NATIONAL TREASURY EMPLOYEES UNION
(Charging Party)

WA-CA-05-0331

DECISION AND ORDER

August 14, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (the Judge) filed by the General Counsel. The Respondent filed an opposition to the General Counsel's exceptions. The complaint alleges that the Respondent violated § 7116 (a)(1), (5) and (8) of Federal Service Labor-Management Relations Statute (the Statute) by failing to provide the Charging Party with certain information requested under § 7114(b)(4) of the Statute. The Judge found that the information requested by the Charging Party was not normally maintained by the Respondent and recommended that the complaint be dismissed.

For the reasons discussed below, we deny the General Counsel's exceptions and dismiss the complaint.

II. Background and Judge's Decision

The Respondent notified a bargaining unit employee of its proposed decision to terminate her. The Respondent based its proposed decision on an investigation conducted by the Treasury Inspector General for Tax Administration (TIGTA), a Treasury Department bureau. *See* Judge's Decision (Decision) at 2-3. Thereafter, the Charging Party made multiple requests for specified information from the Respondent regarding the employee's proposed removal, including all TIGTA investigatory and disciplinary policy documents, TIGTA Conduct Investigation Manual 400, and all non-bargain-

ing unit employee "ALERTS" cases.*¹ *See* GC Exhibits 3 through 6. The Respondent provided the Charging Party with some of the requested information. Decision at 3. However, Respondent did not provide the Charging Party with the requested TIGTA policy documents or investigation manual, stating that the Agency "does not have control over the release of information for the [TIGTA]." *Id.* When the Charging Party did not receive the requested information, it filed a ULP charge. *See id.* at 1-4.

The General Counsel issued a complaint alleging that the Respondent violated § 7116(a)(1), (5) and (8) of (the Statute) by failing to provide the Charging Party with the information that it requested pursuant to § 7114(b)(4) of the Statute. *See* Decision at 1-2. The Judge noted that, under § 7114(b)(4), an agency has the duty to provide a union upon request and, to the extent not prohibited by law, data:

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

Decision at 7 (citing § 7114(b)(4)). The Judge also noted that a union "must establish a particularized need for the information by articulating, with specificity, the basis of its need, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute." *Id.*

The Judge found undisputed evidence that although the Respondent and TIGTA are both bureaus within the Department of the Treasury, they are "completely separate entities and are independent of each others' control." Decision at 8. For that reason, the Judge found that the General Counsel's reliance on Authority precedent concerning inspectors general was misplaced. The Judge found that the weight of the evidence showed that TIGTA was a "third party" analogous to an "outside contractor." *Id.* In addition, the Judge found that the General Counsel's reliance on *United States Department of Justice, Washington, D.C.*, 46

1. * The record does not disclose the meaning of "ALERTS."

FLRA 1526, 1537 (1993) (*DOJ*), *vacated and remanded, sub nom.*, *United States Department of Justice v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994), *decision on remand*, 51 FLRA 1467 (1996), *aff'd, sub nom.*, *United States Department of Justice v. FLRA*, 144 F.3d 90 (D.C. Cir. 1998) was misplaced because the disputed information in that case, which was controlled by an agency's inspector general, was reasonably available to the agency and was therefore subject to disclosure. Decision at 8. The Judge further found that the General Counsel "characterized TIGTA as the agent of the [Respondent]" but "produced no evidence" to substantiate such a relationship. *Id.* at 9. The Judge concluded that "the Respondent lacked the authority to require TIGTA to disclose the information requested by the [Charging Party]." *Id.* The Judge noted that the information sought by the Charging Party was not used by the Respondent in reaching its final decision regarding the employee. *Id.*

Based on the foregoing, the Judge concluded that the information requested by the Charging Party was not normally maintained by the Respondent in the regular course of business. *Id.* at 10. Accordingly, the Judge determined that the Respondent did not commit a ULP by failing to provide the Charging Party with the requested documents. *Id.* Thus, the Judge recommended that the Authority dismiss the complaint. *See id.*

III. Positions of the Parties

A. General Counsel's Exceptions

The General Counsel contends that TIGTA is "an agent of the [IRS] for the purposes of § 7114(b)(4) of the Statute." Exceptions at 8. According to the General Counsel, the Authority has consistently recognized that an inspector general's office is a component of the agency for which it works. In this connection, the General Counsel relies on *United States Department of Justice, Washington, D.C., et. al.*, 56 FLRA 556 (2000) (*Justice*), *aff'd sub nom.*, *United States Department of Justice v. FLRA*, 266 F.3d 1228 (D.C. Cir. 2001); *Headquarters NASA, Washington, D.C.*, 50 FLRA 601, 621 (1995) (*NASA*), *enf'd sub nom.*, *FLRA v. Headquarters NASA, Washington, D.C.*, 120 F.3d 1208 (11th Cir. 1997), *aff'd*, 527 U.S. 229 (1999); and *DOJ*, 46 FLRA 1526. The General Counsel notes that TIGTA undertook the investigation at the request of, and on behalf of, the Respondent, thus making TIGTA an agent of the Respondent. Exceptions at 9-10. In the alternative, the General Counsel asserts that, if the Authority finds that TIGTA's role is analogous to that of an outside contractor, then Authority precedent holds that such contractor

must follow the requirements of the Statute. *Id.* at 10 (citing *Soc. Sec. Admin., Office of Hearings & Appeals, Boston Regional Office, Boston, Mass.*, 59 FLRA 875, 880 (2004) ("the fact that a contractor, rather than an agency employee, was designated by the agency to conduct these investigations does not diminish the relationship with the [r]espondent"), *motion for reconsideration as to remedy granted*, 60 FLRA 105 (2004).

The General Counsel also contends that the Judge erred as a matter of law by failing to make a determination as to whether the Charging Party established a particularized need for the requested information. *Id.* at 11. According to the General Counsel, the Charging Party established a particularized need for each piece of data identified in its information request. *Id.* at 12. In particular, the General Counsel asserts that the Charging Party indicated that it needed the policy manuals to demonstrate that TIGTA's investigation was not conducted properly and that the investigation manual was needed to show how investigations should be conducted. *Id.* at 12-13. The General Counsel points out that the Charging Party sought the information to prepare its oral reply to the employee's proposed adverse action. *Id.* at 13.

In the alternative, the General Counsel contends that the Authority should remand the case to the Judge for fact-finding on the issue of particularized need. *See id.* at 16. The General Counsel asserts that without such findings, the Authority cannot make a reasoned assessment on whether the Charging Party established a particularized need and, therefore, cannot determine whether the Respondent unlawfully failed to disclose the requested information. *Id.*

B. Respondent's Opposition

The Respondent asserts that the Judge properly found that it did not violate the Statute. In particular, the Respondent contends that TIGTA is not under the Respondent's authority and, thus, Respondent cannot compel TIGTA to provide the documents and manual. *See Opposition* at 11. The Respondent maintains that because it did not have or control the documents it sought, it could not furnish them to the Union. *Opposition* at 14-15.

Finally, the Respondent asserts that it provided the Charging Party all of the documents on which it relied in deciding whether to remove the employee. *See id.* at 14. Thus, the Respondent asserts that the Charging Party cannot establish a particularized need for the policy documents and investigation manual. *See id.* at 17-20.

IV. Analysis and Conclusions

The General Counsel challenges the Judge's determination that TIGTA is not an agent of the Respondent, relying on Authority precedent involving inspectors general: *Justice*, *NASA* and *DOJ*. However, in the cases relied on, the inspectors general were components of the respondents and thus, under the control of the respondents.

In this case, by contrast, the record supports the Judge's determination that TIGTA is not an agent of the Respondent. In this regard, although TIGTA undertook the investigation at the request of, and on behalf of, the Respondent, there is no dispute that TIGTA is not a component of the Respondent. Unlike other cases involving a respondent and its own inspector general, TIGTA is not the Respondent's inspector general, but a separate, independent inspector general in the Department of the Treasury, the executive department in which both the Respondent and TIGTA are bureaus.

In *United States Department of Justice, Office of the Inspector General, Washington, D.C.*, 45 FLRA 1355, 1356 n.2, 1358-59 (1992) (*Justice, OIG*) the Authority dismissed a complaint alleging that the respondent failed to comply with § 7114(b)(4) of the Statute. In so doing, the Authority held that the requested information was not normally maintained by, or reasonably available to, Respondent INS because it was in the possession of OIG, a separate component of the Department of Justice. Applying *Justice, OIG* here, we conclude that, as the requested information is not normally maintained by or reasonably available to the Respondent, the Respondent did not violate the Statute by failing to furnish the Union with the requested information. See *Justice, OIG*, 45 FLRA at 1359.

In sum, the Judge properly determined that the information sought was not in Respondent's possession, was not normally maintained by Respondent, and was not reasonably available. In these circumstances, the Judge also properly determined that he did not need to rule on whether the Charging Party had established a particularized need. See Decision at 10; *Justice, OIG*, 45 FLRA at 1358-59. Accordingly, we find that Respondent did not violate the Statute as alleged when it failed to supply the Charging Party with the requested policy documents and investigation manual.

Consistent with the Authority's decision in *Justice, OIG*, we deny the exceptions.

V. Order

We adopt the findings and recommendations of the Judge, deny the exceptions and dismiss the complaint.